UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16

LAMONS GASKET COMPANY, A DIVISION OF TRIMAS CORPORATION, Employer, and MICHAEL E. LOPEZ, AN INDIVIDUAL, Petitioner, and UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, Union.	)

LAMONS GASKET COMPANY'S BRIEF IN OPPOSITION
TO UNITED STEELWORKERS' REQUEST FOR REVIEW OF
REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

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I. INTRODUCTION

Lamons Gasket Company a Division of Trimas Corporation ("Employer" or "Lamons") hereby files this Brief in Opposition to the Request for Review of Regional Director's Decision and Direction of Election filed by the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union ("Union") on August 6, 2010. The Union's response was due on August 9, 2010, pursuant to an extension provided by the National Labor Relations Board ("Board"). This Brief in Opposition is timely filed on August 16, 2010 pursuant to NLRB Rules & Regulations § 102.67(e).

In its Request for Review, the Union seeks to have the Board overrule its recent decision in *Dana Corp.*, 351 NLRB 434 (2007), (hereafter "*Dana*"), and thereby enjoin the secret-ballot decertification election sought by Lamons employees who presented a valid showing of interest to the Director of Region 16. The Union's Request for Review should be denied and *Dana* should remain the governing standard. In the alternative, if *Dana* is altered by the Board, that ruling should be applied prospectively to allow the employees of Lamons exercise their right to vote and have their voice heard in this decertification election.

II. RELEVANT BACKGROUND[1]

On July 11, 2003, the parties entered into a neutrality agreement which covered multiple Lamons facilities including the facility located in Houston, Texas. [Stip. No. 5]. On November 5, 2009, Lamons voluntarily recognized the Union as the exclusive collective bargaining representative of all production, warehouse, and maintenance employees located at the Houston facility. [Stip. No. 6]. On that same day, the parties notified Region 16 that Lamons had recognized the Union as the collective bargaining representative of the unit employees. [Stip.

[1] Lamons incorporates by references the Joint Stipulation between the parties entered into on July 9, 2010.

No. 7]. On November 19, 2009, pursuant to the Board's decision in *Dana,* Region 16 transmitted notice to employees to Lamons for posting. [Stip. No. 8]. On November 23, 2009, Lamons posted the notice at its Houston facility. [Stip. No. 9]. On December 9, 2009, Lamons employee Michael Edward Lopez timely filed a decertification petition. The Regional Director then ordered a decertification election on July 21, 2010 pursuant to a Decision and Direction of Election. The Union is now appealing that Decision and Direction of Election.

III. ISSUES PRESENTED

1. Whether the Board Should Grant the Union's Request for Review of Regional Director 16's Decision and Direction of Election?

2. If the Union's Request is Granted, Whether the Board Should Affirm, Modify, or Overrule *Dana's* 45-Day Rule?

3. If *Dana* is Modified or Overruled, Whether the Decision Should be Applied Prospectively to Allow the Employees' Votes to Count?

As set forth below, Lamons opposes the Union's Request for Review and similarly opposes the Union's position that *Dana* should be overruled. However, if *Dana* is overruled, Lamons urges the Board to prospectively apply the change in the law for numerous reasons set forth below.

IV. ARGUMENT AND AUTHORITY

A. Lamons Appropriately Recognized the Union, However It Also Supports its Employees' Right to Hold an Election.

Voluntary recognition is a permissible and legitimate right of employers and labor organizations. The Board has a long-established policy to promote voluntary recognition and bargaining between employers and labor organization, "as a means of promoting harmony and stability of labor-management relations." *Motion Picture & Videotape Editors Guild, Local No. 776,* 311 NLRB 801, 804 (1999). Likewise, the United States Supreme Court has long

recognized that a Board-supervised, secret-ballot election is not the only method for determining majority support for a union. *See e.g., Gissell Packing Co. v. NLRB*, 395 U.S. 575, 596-99 (1969); *United Mine Workers v. Arkansas Flooring Co.,* 351 U.S. 62, 72 n. 8 (1956). Lamons believes that the *Dana* rule accomplishes both of the bedrock objectives of the National Labor Relations Act.

As a means of promoting harmony and stability, on November 5, 2009, Lamons voluntarily recognized the Union as the exclusive collective bargaining representative of all production, warehouse, and maintenance employees located at the Houston facility. Shortly thereafter, a Lamons employee exercised his *Dana* rights and timely filed a decertification petition with the Regional Director. Notwithstanding Lamon's voluntary recognition of the Union, it has no reservation with its employees exercising their *Dana* rights and proceeding with the decertification election. In fact, Lamons, the Union, and the employees have been operating under the *Dana* rule for the duration of this decertification process, and as such, Lamons believes that its employees should be permitted to exercise their Section 7 rights under the *Dana* paradigm. Lamons joins the Board's majority opinion which granted review in the *Dana* case when it reasoned that "the secret-ballot election remains the best method for determining whether employees desire union representation . . . ." 341 NLRB No. 150, slip op. at 1 (June 7, 2004). Because Lamons has no objection to the decertification election, it opposes the Union's Request for Review.

B. The *Dana* Rule Should Be Affirmed.

In *Dana,*[2] the Board modified the recognition-bar doctrine and held that no election bar will be imposed after a card-based recognition unless (1) employees in the bargaining unit

[2] The rationale of the majority opinion in *Dana* is adopted herein by reference and will not be repeated at length.

receive notice of the recognition and of their right, within 45 days of the notice, to file a decertification petition or to support the filing of a petition by a rival union, and (2) 45 days pass from the date of notice without the filing of a valid petition. *Dana,* 351 NLRB at 434 ("*Dana* rule"). If a valid petition supported by 30 percent or more of the unit employees is filed within 45 days of the notice, the petition will be processed. *Id.* These principles will govern regardless of whether a card-check and/or neutrality agreement preceded the union's recognition. *Id.* Importantly, the Board adopted this rule to only be applied ***prospectively***. *Id.* at 435. The Board chose to apply the *Dana* rule prospectively to "avoid inequitable disruption of bargaining relationships established on the basis of the former voluntary recognition-bar doctrine." *Id.*

The *Dana* rule should be affirmed as it properly balances the stability of labor-management relationships created by "voluntary recognition" with the need to protect employees' Section 7 rights to join a union or refrain from unionization. The *Dana* rule provides stability of labor-management relations through the recognition bar and also provides a 45-day window for employees to exercise their Section 7 rights determine their own union destiny.[3] The rule's 45-day window underlines the importance of providing employees with the opportunity to participate in elections. When looked at from that perspective, *Dana* is yet another decision in a long line of decisions that recognizes the importance of elections when determining union

[3] The Board recognized that, while there may be competing interests at stake, the ***paramount*** policy of the NLRA is to protect the employees' right to unionize or, in the alternative, to refrain from unionization. *See, e.g., Pattern Makers League v. NLRB*, 473 U.S. 95 (1985) (paramount policy of the NLRA is "voluntary unionism"); *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992) ("By its plain terms, thus, the NLRA confers rights only on employees, not on unions or their nonemployee organizers. . . ."); *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301, 304, 307 (1974); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 602 (1969) ("secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support"); *Brooks v. NLRB*, 348 U.S. 96 (1954) ("an election is a solemn and costly occasion, conducted under safeguards of voluntary choice").

representation.[4] Even prior to the 1947 Taft-Hartley Act amendments, the Board, operating under the original Wagner Act of 1935, expressed preference for secret ballot elections in determining questions of union representation. *Cudahy Packing Co.*, 13 NLRB 526, 527 (1939) (announcing that the Board would no longer base union certification on authorization card signings "in the interest of investing . . . certifications with more certainty and prestige by basing them on free and secret elections conducted under the Board's auspices."); *see also Joe Harris Lumber*, 66 NLRB 1276, 1283 (1946) (the Board stated that it did "not feel . . . that a card check reflects employees' true desires with the same degree of certainty" as a secret ballot election). That view has continued unchallenged at the Board to present. *See, e.g., Levitz Furniture Co. of the Pacific, Inc.*, 333 NLRB 717, 723 (2001) ("[W]e emphasized that Board-conducted elections are the preferred way to resolve questions regarding employees' support for unions."). The current *Dana* rule allows the best of both worlds—industrial peace if voluntary recognition occurs and no decertification petition is timely filed, yet if the employees do file a timely decertification petition, the employees, the true beneficiaries of the National Labor Relations Act, get to make their decision regarding union representation in the time-honored "gold standard" secret ballot election.

From a practical perspective, the Board has issued statistics which demonstrate that the *Dana* rule is working. These statistics[5] show that *Dana* has not hindered or delayed the vast majority of voluntary recognitions from taking effect. Since *Dana*, the employees who

[4] By statute, the Board is charged with the responsibility of protecting employee rights through a policy of encouraging secret ballot elections, *Linden Lumber Div. v. NLRB*, 419 U.S. 301 (1974), the core principle of "voluntary unionism." *Pattern Makers v. NLRB*, 473 U.S. 95, 102-03 (1985).

[5] The General Counsel's report can be found at http://www.nlrb.gov/shared_files/GC%20Memo/2009/GC%2009-06%20Rpt%20on%20 Midwinter%20Mtg%20of%20the%20ABA.pdf.

successfully decertified unwanted unions or voted for representation by rival unions have surely had their Section 7 rights vindicated in a way that no unfair labor practice charge could ever do.

For all of the foregoing reasons, the Board should not jettison a rule that protects and promotes the "gold standard" of employee free choice – the secret ballot election. *Gissel Packing Co.*, 395 U.S. at 602 ("secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support"). Nor should the Board give way to political pressure by suddenly reversing the carefully considered decision in *Dana.*

C. Even If *Dana* Is Modified or Overruled, the Board's Decision Should Apply Prospectively to Avoid Inequitable Results.

The Board's decision in *Dana* properly weighs the interests of stability in labor-management relations and employees rights, and should be upheld. However, if the Board modifies or overrules the *Dana* rule, such a decision should only be applied prospectively for the reasons set forth below. In fact, the same reasons that require a post-*Dana* rule to be applied prospectively were identified by the Board in 2007 when it handed down the *Dana* decision:

> The Board's general practice is to apply policies and standards to "all pending cases in whatever stage." However, the Board will make an exception in cases where retroactive application could, on balance, produce ***"a result which is contrary to a statutory design or to legal and equitable principles."*** We find an exception warranted here on equitable grounds. ***Our decision today marks a significant departure from preexisting law.*** In reliance on that law, the parties in the present cases entered into voluntary recognition agreements with the understanding that the established recognition bar would immediately preclude the filing of Board petitions for a reasonable period of time. Other unions and employers have also entered into voluntary recognition agreements , and subsequently executed collective-bargaining agreements, that would not bar election petitions under our new policy because employees did not receive the notice of recognition that has not heretofore been required. Moreover, although retroactive application would further employee free choice, it would also destabilize established bargaining relationships. Thus, retroactivity would produce mixed results in accomplishing

> purposes of the Act, while the reliance interests of the parties and those similarly situated would be unequivocally and substantially frustrated.

Id. at 443-44 (emphasis added). Essentially, the Board reasoned that because *Dana* was a "significant departure from preexisting law" and employers, unions, and employees alike relied on that preexisting law, then it would be inequitable to apply the new *Dana* rule retroactively. Symmetrically, if the Board should overrule *Dana*, it would represent the same "signature departure" which would require prospective application so as to avoid inequities to employers, unions, and employees. For purposes of the matter at hand, this would require the Board to allow the decertification election to proceed and to lend full weight to the outcome of that election.

The Board's decision in *Dana* is not the only example of prospectively applying Board orders. In *Levitz Furniture Co. of the Pacific, Inc*, 333 NLRB 717 (2001), the Board "ruled that employers may withdraw recognition unilaterally only by showing that unions have actually lost majority support" and had to "decide whether to apply the new rule retroactively, *i.e.*, in all pending cases, or only prospectively." Much like *Dana*, the Board cited the standard: "[t]he propriety of retroactive application, however, is determined by balancing any ill effects of retroactivity against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles." The Board reasoned that the parties' reliance upon the previous standard was a factor in favor of prospective application of the new rule. The Board further reasoned that:

> In our view, the Respondent and other similarly situated employers did not leave adequate warning that the Board was about to change its standard for withdrawing recognition at the time of the events in the pending cases. Therefore, we shall decide all pending cases involving withdrawals of recognition under existing law.

Levitz Furniture Co. of the Pacific, Inc, 333 NLRB 717, 729 (2001).

Even more compelling is a federal Court of Appeal's review of the Board's decision to retroactively apply a new rule in *Epilepsy Foundation of Northeast Ohio v. NLRB*, 268 F.3d 1095 (D.C. Cir. 2001). In that case, the U.S. Court of Appeals for the District of Columbia Circuit held that the Board erred in giving retroactive effect to its new rule that employees not represented by a labor organization have a right to request representation by a coworker during an investigatory interview that could lead to discipline. *Id.* at 1102-1103. The court held that the Board's rule had to be applied prospectively only, because it was such an abrupt departure from settled law. *Id; see also SNE Enters.*, 344 NLRB 673, 675 (2005) (departure from settled law requires prospective application); *Crown Bolt, Inc.*, 343 NLRB 776 (2004) ("In light of these considerations, we will apply the rule we announce today prospectively only"); *CNN Am., Inc.*, 352 NLRB 265, 267 (2008) (applying order prospectively); *Dresser Industries,* 264 NLRB 1088, 1089 (1982) (applying new requirement that employers bargain with incumbent union pending outcome of decertification election prospectively only because employer in that case acted in reliance on extant law); *Excelsior Underwear,* 156 NLRB 1236, at 1246 fn. 5 (1966) (applying new requirement that employers provide names and addresses of employees to petitioning union prospectively only because the employer in that case had no such obligation under extant law).

Much like the parties in *Dana, Levitz, Epilepsy Foundation of Northeast Ohio,* and the other cases cited above, the parties in the current matter have relied on *Dana* rule throughout the decertification process. Going past this matter, unions, employers, employees and the public have learned the rule in *Dana* and have followed it well. Hundreds of unions or employers have filed the necessary papers with NLRB Regional offices noting the voluntary recognition, and hundreds of employers have posted a simple *Dana* notice appraising employees of their rights. If the Board were to overrule *Dana* and retroactively apply the rule, it would certainly result in the

same inequities which the Board and courts warned against in the cases above. *See Dana*, 351 NLRB at 443-444 ("Thus, retroactivity would produce mixed results in accomplishing the purposes of the Act, while the reliance interests of the parties and those similarly situated would be unequivocally and substantially frustrated."). The parties have followed the rules and are entitled to the benefit of their compliance – an election. To enjoin an election, or worse, to allow an election yet not lend full weight to the outcome would be inequitable to all parties involved.

Second, retroactive application of a change to the *Dana* rule would not further the purposes of the Act. As the Board in *Dana* reasoned "although retroactive application would further employee free choice, it would also destabilize established bargaining relationships." *Dana*, 351 NLRB at 444. Conversely, overruling the *Dana* rule would further the stabilization of labor-management bargaining relationship but would drastically decrease employee free choice. Thus, it logically follows that if retroactive application of the *Dana* rule would not further the purposes of the Act, then the retroactive application of the overturned *Dana* rule would similarly not further the purposes of the Act.

Finally, from a practical perspective, retroactive application of the overturned *Dana* rule would render employees as powerless to exercise choice at the hands of an ever-changing Board. Such retroactive application would either enjoin the election or invalidate the outcome of the election. In fact, employees would become seriously disenchanted with the Board if it were to tell them that their votes did not count. It would create a situation where employees have worked towards a goal of exercising their Section 7 rights only to have the rug pulled out from under them by the Board decision. Going further, this would create additional employee resentment towards the Union and this internal strife could affect the Employer's productivity. Enjoining or

invalidating the decertification election creates a situation where everyone loses – the employer, employees, union, and the Board.

V. CONCLUSION

The Request for Review should be summarily denied.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that service of the foregoing Lamons Gasket Company's Brief in Opposition to United Steel Workers' Request for Review of Regional Director's Direction of the Election was made on the following via First Class Mail, postage prepaid, at Fort Wayne, Indiana on this 16th day of August, 2010:

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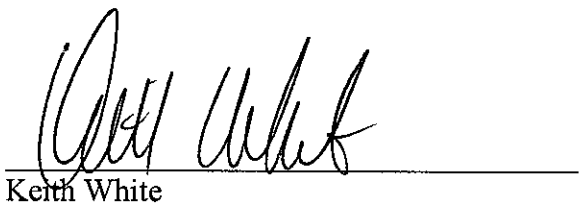

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